

Memorandum: Implementation of Regulatory Freeze

M-17-16

MEMORANDUM FOR THE HEADS AND ACTING HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES

FROM: Mark Sandy, Acting Director

SUBJECT: Implementation of Regulatory Freeze

This Memorandum provides guidance on implementing the Memorandum of January 20, 2017, entitled "Regulatory Freeze Pending Review" ("Freeze Memo").

Postponement of Effective Dates of Certain Published Regulations

Paragraph 3 of the Freeze Memo instructs your departments and agencies ("agencies") as follows:

With respect to regulations that have been published in the *[Federal Register]* but have not taken effect, as permitted by applicable law, temporarily postpone their effective date for 60 days from the date of this memorandum, subject to the exceptions described in paragraph 1, for the purpose of reviewing questions of fact, law, and policy they raise. Where appropriate and as permitted by applicable law, you should consider proposing for notice and comment a rule to delay the effective date for regulations beyond that 60 day period. In cases where the effective date has been delayed in order to review questions of fact, law, or policy, you should consider potentially proposing further notice-and-comment rulemaking.

Your agency staff has identified or should promptly identify regulation^[1] that have been published in the *Federal Register* but have not yet taken effect. For such regulations, paragraph 3 of the Freeze Memo instructs your agency to undertake several actions.

First, absent applicable exceptions (discussed below), postpone for 60 days the effective dates of regulations that have been published but have not yet taken effect for the purpose of reviewing questions of fact, law, and policy "as permitted by applicable law." To the maximum extent possible, your explanations for postponement should be individualized to the regulation being postponed. In addition, the Administrative Procedure Act generally establishes procedural requirements for agencies promulgating rules, subject to certain exceptions and exemptions. Please consult with your agency's Office of General Counsel as you implement the Freeze Memo and this Memorandum.

Second, consider postponing the effective date beyond 60 days where appropriate. If such a postponement is appropriate, seek comment on the extended postponement, in accordance with the Freeze Memo.^[2] If your agency takes comment on the initial 60-day postponement, e.g., by issuing a notice of proposed rulemaking, consider using the same action to take comment on an extended postponement. In addition, please consider taking comment on the regulation itself, including about questions of fact, law, and policy that the agency should recognize as it considers whether the regulation raises any substantial questions.

Finally, if during your review you determine a regulation raises no substantial question of fact, law, or policy, please provide your Office of Information and Regulatory Affairs (OIRA) Desk Officer a list of such regulations on which you plan to take no further action no later than two weeks prior to the postponed effective date for those regulations. Alternately, if you determine a regulation raises a substantial question of fact, law, or policy, please notify your OIRA Desk Officer promptly and consider whether your agency should perform additional rulemaking or take other further actions. If your agency determines it should take further actions, please consult with your OIRA Desk Officer in accordance with the Freeze Memo.

Actions Related to the *Federal Register* and OIRA

Subject to any exceptions, withdraw all regulations that have been sent to the Office of the Federal Register (OFR) but have not yet been published. This will allow review of those regulations as the Freeze Memo envisions. To facilitate such withdrawals, please see an example withdrawal letter in Appendix A.

Note that the OFR's specific requirements for the withdrawal of documents depend on whether those documents have been filed for public inspection. Some of those requirements are particularly time sensitive. Specifically, for those regulations that have been filed for public inspection but not published, Chapter 4.3 of the Federal Register Document Drafting Handbook requires the following for withdrawals:

If we have filed the document for public inspection, your [Federal Register] Liaison Officer may withdraw it from publication only by submitting a letter requesting the withdrawal An official with authority to sign Federal Register documents or the Liaison Officer must sign this letter.

The Liaison Officer must e-mail the OFR at fedreg.liaison@nara.gov as soon as possible to confirm that the letter has been sent. In addition:

The letter must reach the OFR during regular office hours (8:45 a.m. to 5:15 p.m. ET) before noon on the workday before the document's scheduled publication date. We will not withdraw the document until we receive your letter.

Thus, if it has not already done so, your agency should submit withdrawal letters to the OFR as soon as possible.

In addition, subject to any exceptions, send no further regulations to the OFR until an agency head appointed or designated by the President after noon on January 20, 2017, reviews and approves the regulations.^[3] Also, consistent with the Freeze Memo's direction to comply with applicable Executive Orders (EOs) concerning regulatory management, please continue to follow the process outlined in EO 12866 to determine whether any such approved regulation is significant and therefore subject to OIRA review.

Finally, consistent with the Freeze Memo's broad scope, and to ensure that OIRA reviews only those regulations that have already been reviewed by the appropriate person at each agency, I am requesting that your agency withdraw any regulations currently at OIRA.

Exceptions

There are two exceptions to the above directions. First, exclude from those actions any regulations "subject to statutory or judicial deadlines." These are regulations where performing the otherwise required review actions would endanger compliance with an operative statutory or judicial deadline. For example, agency civil monetary penalty adjustments that were due this month ^[4] and were not significant regulatory actions under EO 12866 likely fall within this exception. After you have identified such regulations, please contact your OIRA Desk Officer with a list of those regulations as well as a brief explanation of your determination that provides a reference to the statutory or judicial deadline.

Second, the Freeze Memo authorizes the Director or Acting Director of the Office of Management and Budget to make exceptions from the Freeze Memo's requirements under paragraphs 1-3 "for emergency situations or other urgent circumstances relating to health, safety, financial, or national security matters, or otherwise." Please send your OIRA Desk Officer a list of such regulations, if any; the type of regulatory action each regulation is; which paragraphs of the Freeze Memo those regulations should be excepted from; and a brief explanation for each such regulation of the emergency situation or urgent health, safety, financial, national security, or other matter that forms the basis of the requested exception. The Office of Management and Budget will review your justification promptly and provide further guidance.

Applicability

As used in this Memorandum, "regulation" has the meaning given to "regulatory action" in section 3(e) of EO 12866, and also includes any "guidance document" as defined in section 3(g) of EO 12866 as it existed when EO 13422 was in effect. In other words, "regulation" means:

1. [A]ny substantive action by an agency (normally^[5] published in the *Federal Register*) that promulgates or is expected to lead to the promulgation of a final rule or regulation, including notices of inquiry, advance notices of proposed rulemaking, and notices of proposed rulemaking, and
2. Any agency statement of general applicability and future effect, other than a regulatory action as defined in EO 12866, "that sets forth a policy on a statutory, regulatory, or technical issue or an interpretation of a statutory or regulatory issue."

If you have any questions about this Memorandum, the Freeze Memo, or the review process, please contact your OIRA Desk Officer.

APPENDIX A

[AGENCY LETTERHEAD]

January [XX], 2017

Oliver Potts, Director
Office of the Federal Register (F)
The National Archives and Records Administration
8601 Adelphi Road
College Park, MD 20740-6001

Dear Mr. Potts:

Please withdraw from publication the rule [NAME OF REGULATORY ACTION and RELEVANT IDENTIFYING INFORMATION], which is currently [on public inspection and] scheduled to publish in the Federal Register on January [YY], 2017.

This request is made in compliance with the White House Chief of Staff Memorandum titled Regulatory Freeze Pending Review, signed on January 20 2017, by White House Chief of Staff Reince Priebus.

Sincerely,

[SIGN]

Type name,
Title

[1] In accordance with the Freeze Memo, this Memorandum uses a broad definition of "regulation." Please see the Applicability section below for more information.

[2] For guidance documents, as referenced in the Applicability section, it may not be appropriate to go through notice and comment for a postponement, *e.g.*, when the initial guidance did not go through notice and comment.

[3] The Freeze Memo indicates that such a department or agency head may delegate this power of review and approval to any other person so appointed or designated by the President, consistent with applicable law.

[4] Federal Civil Penalties Inflation Adjustment Act of 1990, Pub. L. No. 101-410, 104 Stat. 890 (amended 2015) (codified as amended at 28 U.S.C. § 2461 note).

[5] Note there may be circumstances where a substantive action of the type EO 12866 contemplates is not published in the *Federal Register*.